Supreme Court, U.S.
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No. 97-1109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LAND AND LAKES COMPANY, an Illinois Corporation, and STONY ISLAND RECLAMATION CO., an Illinois Corporation,

Petitioners,

v.

HENRY L. HENDERSON, in his official capacity as Commissioner of the Department of the Environment, and THE CITY OF CHICAGO, a Municipal Corporation,

Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Respondents argue for the denial of Land and Lakes' Petition for Certiorari on four grounds: (1) that this Court lacks jurisdiction of the questions presented; (2) that Land and Lakes did not argue for a heightened level of scrutiny for land use cases under substantive due process in the trial court, and therefore waived that argument to this Court; (3) that the "substantial relation" test and the "rational relation" test are really the same test, just stated differently; and (4) that even if there is a heightened level of scrutiny, that test only applies to zoning cases, and the City's landfill moratorium ordinance is not a zoning ordinance. For the reasons set forth herein, this Court should reject the Respondents' arguments.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO GRANT LAND AND LAKES' PETITION FOR WRIT OF CERTIORARI

Respondents' argument that this Court lacks jurisdiction because a takings claim is pending in the Illinois trial court is unsupported in the law. This Court should reject the Respondents' argument for two equal, but separately compelling reasons. First, this case fits into the third exception for final judgments as enunciated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Second, since time is critical in this matter, the issues presented are ripe for this Court's review.[1]

Petitioners Land and Lakes Company and Stony Island Reclamation Co. ("Land and Lakes") have properly invoked this Court's jurisdiction under 28 U.S.C. §1257. There exist at least four categories of cases where a decision on a federal issue has been treated as a final judgment for purposes of §1257, and where this Court has assumed jurisdiction over the case without waiting for the completion of additional proceedings pending in the lower state courts. *Cox*

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[1] Citizens For a Better Environment is not a party in this case and accordingly its Brief in Opposition should be stricken. For the reasons contained herein, the Citizens' jurisdictional argument also has no merit.

Broadcasting Corp., 420 U.S. at 477. The third category under *Cox* is comprised of those cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. In these cases, if the party asking for interim review ultimately wins on the merits, the federal issue will be mooted. *Id.*; *see also North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

This case falls within the third category of cases enumerated in *Cox*. The trial court entered judgment for Land and Lakes on its declaratory judgment, preemption, procedural due process, and substantive due process counts contained in its Verified Complaint. The trial court dismissed Land and Lakes' estoppel and takings claims without prejudice, with leave to reinstate if necessary. Pursuant to Illinois Supreme Court Rule 304(a)[2] and *at Respondents' request*, the trial court certified that its decision as to Land and Lakes' due process claim was a "final judgment," and that there was no just reason for Respondents to delay in appealing the court's decision.[3]

The issues were fully briefed before the Illinois Appellate Court, and that court entered an order on Land and Lakes' substantive due process claim and the other claims before it. Further, the Illinois Appellate Court ordered the case remanded to the trial court to

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[2] Illinois Supreme Court Rules 306, 307 and 308 provide the means to appeal interlocutory orders. Illinois Supreme Court Rule 304, however, requires an express written finding by the trial court that its decision is a "final judgment" as to one or more but fewer than all of the claims involved in the case. Ill. S. Ct. R. 304(a). Thus, the trial court, at the City's own request, declared its decision on Land and Lakes' due process claim a "final judgment" and therefore appealable.

[3] Now that the Respondents have obtained a favorable ruling in the appellate court, they argue that there has been no final judgment because there is a pending federal takings claim in the trial court. This argument is inherently inconsistent with the position they have taken in the Illinois courts; namely, that the appellate court's decision is a final order and that they will seek a mandate from the appellate court to compel Land and Lakes to cease using its additional landfill acreage.

resolve any remaining issues.[4] The Illinois Supreme Court subsequently denied Land and Lakes' petition for leave to appeal. Thus, any inquiry into Land and Lakes' substantive due process claim is over as far as the Illinois courts are concerned, and the Illinois Appellate Court's determination as to the Petitioners' due process claim is law of the case. *See, e.g., Foster v. Kanuri*, 288 Ill. App. 3d 796, 681 N.E.2d 111 (1st Dist. 1997).

Respondents' argument that Land and Lakes may later seek review of the due process issue following determination of the claims pending in the trial court is simply incorrect. Regardless of whether Land and Lakes or Respondents appeal the trial court's determination as to Land and Lakes' remaining takings, estoppel and breach of contract claims, the only issues which would still be appealable to the Illinois Appellate and Supreme Courts would be issues relating to the remaining claims. Neither the Illinois Appellate Court nor the Illinois Supreme Court would consider Land and Lakes' substantive due process claim again, or any issue already decided by the Appellate Court's December 31, 1996 Opinion and Order. *Id.* This Court, in turn, would not have jurisdiction to hear Land and Lakes' substantive due process claim at a later date. Therefore, if there is to be a review of Land and Lakes' substantive due process claim by this Court, it is now or never. *See North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163-64 (1973). *See also Hudson Distributors, Inc. v. Eli Lilly & Co., Inc.*, 377 U.S. 386, 389 (1964) (holding the existence of separate and unresolved federal issues pending in a state trial court does not render a judgment of a State's highest court nonfinal or unappealable within 28 U.S.C. § 1257).

This Court also has asserted jurisdiction over decisions of a lower court where time was a critical factor. *See, e.g., National Socialist*

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[4] Land and Lakes' takings claim was reinstated in the trial court *after* the Illinois Appellate Court rendered its decision, but *before* Land and Lakes filed its petition for leave to appeal to the Illinois Supreme Court. The Respondents *never* raised in its response to Land and Lakes' petition any issue relating to Land and Lakes' right to seek review by the Illinois Supreme Court, or as to the non-finality of the its claims due to the reinstated takings and estoppel claim.

Party of America v. Village of Skokie, 432 U.S. 43 (1977); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). Here, time is in fact critical. Respondents have consistently asked that the Illinois Appellate Court issue its mandate immediately, at which time the City would move to revoke Land and Lakes' City operating permit. If successful, the City's action would effectively end Land and Lakes' business. Land and Lakes' ability to stay in business, therefore, is a private interest at stake that could be "irremediably lost." *See Hudson*, 377 U.S. at 399 (J. Harlan, dissenting). Under these circumstances, it makes little sense for Land and Lakes' substantive due process claims to lie in wait until the trial court makes its determination as to Land and Lakes' remaining claims. Such a determination could take a considerable amount of time, which Land and Lakes, with its livelihood at stake, cannot afford. Thus, time is of the essence, and this Court should invoke its jurisdiction.[5]

For the foregoing reasons, Land and Lakes respectfully requests that this Court find the Illinois Appellate Court's decision and the Illinois Supreme Court's denial of review final for purposes of 28 U.S.C. §1257, and consider Land and Lakes' Petition on the merits.

II. LAND AND LAKES PROPERLY PRESENTED ITS SUBSTANTIVE DUE PROCESS CLAIM AT ALL STAGES OF THE LITIGATION BELOW

The City erroneously claims that Land and Lakes failed to preserve its substantive due process claim in the Illinois courts. The City's argument is belied by the record. Land and Lakes properly presented its substantive due process claim at all stages of the litigation below. Land and Lakes successfully asserted its substantive due process claim at trial, and the trial court ordered that the City immediately issue an operating permit to Land and Lakes for the 122nd Street Facility. (App. at A51.) When the City appealed

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[5] If, however, the City agrees to stay the mandate pending resolution of Land and Lakes' remaining claims in the Illinois courts, Land and Lakes has no objection to staying its Petition for Writ of Certiorari until such time as the remaining issues are resolved, so that all issues may be presented to this Court at one time.

that decision, Land and Lakes argued for a heightened level of scrutiny for its substantive due process claim in its Illinois Appellate Court brief. Specifically, Land and Lakes argued that the moratorium did not substantially advance any recognized public interest, as follows:

> In the area of land use regulation, substantive due process requires that the municipality employ a means to achieve a legislative goal which substantially advances the legislative purpose. *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980); *Northern Trust Co. v. City of Chicago*, 4 Ill. 2d 432, 438, 123 N.E. 330 (1954).

(Brief of Plaintiffs-Appellees at p. 33.) The Illinois Appellate Court erroneously applied a "rational relation" test and reversed the trial court's ruling on Land and Lakes' substantive due process claim.

In its Petition for Rehearing of the Appellate Court's ruling, Land and Lakes *again* argued that a higher level of scrutiny applied to land use cases. Specifically, Land and Lakes stated:

> The Court also failed to apply the proper legal standard to evaluate Land and Lakes' substantive due process claim. . . . Both the United State Supreme Court and the Illinois courts have recognized that a higher level of scrutiny is required in the area of land-use regulation when examining the constitutionality of an ordinance *as applied* to a certain piece of property. In such a case, substantive due process demands that the municipality employ a means which *substantially advances* the legislative purpose of the municipality. *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980); *Northern Trust Co. v. City of Chicago*, 4 Ill.2d 432, 438, 123 N.E. 330 (1954).

(Land and Lakes' Petition for Rehearing at page 15).

Land and Lakes argued for a third time, on page 18 of its Petition for Leave to Appeal to the Illinois Supreme Court, that the heightened land use test should apply to its substantive due process claim, as follows:

> Land and Lakes also seeks this Court's review because the Appellate Court failed to apply the proper legal standard to evaluate Land and Lakes' substantive due process claim. . . . Both the United States Supreme Court and the Illinois Courts

> have recognized that a higher level of scrutiny is required in the area of land-use regulation when examining whether the ordinance is constitutional *as applied* to a certain piece of property. In such a case, substantive due process demands that the municipality employ means which *substantially advances* the legislature purpose of the municipality. *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980); *Northern Trust Co. v. City of Chicago*, 4 Ill. 2d 432, 438 123 N.E.2d 330 (1954).

Contrary to the City's suggestion, under Illinois law, an appellee may argue any point in support of its judgment on appeal, so long as the factual basis was before the trial court. *Jackson v. Chicago Bd. of Ed.*, 192 Ill. App. 3d 1093, 549 N.E.2d 829 (1st Dist. 1989) (citing *Shaw v. Lorenz*, 42 Ill. 2d 246, 246 N.E.2d 285 (1969)). Here, Land and Lakes did just that. It prevailed in its substantive due process count in the trial court, and then defended that court's favorable ruling by arguing to the Illinois Appellate Court and to the Illinois Supreme Court that under substantive due process, a land use regulation or ordinance is subject to a higher standard of review. Having properly and consistently presented this issue in the Illinois state courts, Land and Lakes has preserved this issue for appeal, and this Court should properly consider it on a petition for writ of certiorari.

III. LAND AND LAKES' PETITION SHOULD BE GRANTED TO CLARIFY WHETHER THERE IS ONE STANDARD, TWO STANDARDS, OR THE SAME STANDARD USING "DIFFERENT WORDS" TO ANALYZE LAND USE CASES UNDER DUE PROCESS CHALLENGES

The City acknowledges in its Brief in Opposition that this Court, and Circuit Courts around the country, have set forth a substantive due process test in the land use area which requires that a challenged regulation or ordinance bear a "substantial relation" to the objective sought to be obtained. (City's Brief in Opp. at 9-10.)[6] The

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[6] The City recognized in its brief that both *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (citing to *Railway Express Agency v. New York*, 336 U.S. 106

(continued...)

City claims, however, that this test and the "rational relation" test are one in the same, just articulated by the courts in "different ways." (City's Brief in Opp. at 11.) The City's argument demonstrates precisely why this Court should grant Land and Lakes' Petition—there is significant confusion regarding the substantive due process test to be applied to a regulation or ordinance in the land use area.

Because the reviewing courts, including the Illinois Appellate Court in this case, are unclear as to whether there is one test or two, or whether a "substantial relation" is different from a "rational relation," this Court should clarify the standard upon which land use regulations should be examined under the due process clause of the Constitution, and end the confusion. In its Petition, Land and Lakes noted that both the United States Supreme Court and various Circuit Courts are using both the "substantial relation" and the "rational relation" test to examine land use regulations in a substantive due process context. Still other courts confuse these tests, borrowing terms from both standards. Contrary to the City's statement in its Brief in Opposition, it is impossible to discern which standard these courts are applying when deciding the cases. Moreover, the courts themselves are confused, as demonstrated by the Sixth Circuit's statement:

> The lack of uniformity among the circuits in dealing with zoning cases of the "arbitrary and capricious substantive due process" category is remarkable . . . We wish it were in our power to harmonize these decisions, but the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court.

Pearson v. City of Grand Blanc, 961 F.2d 1211, 1219 n. 45 (6th Cir. 1992). Because this case presents the opportunity for the Supreme Court to bring harmony to the inherently inconsistent standards (or at the very least language) currently applied by the Circuits

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[6] (...continued)
(1949) and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)) required that the regulation or ordinance at issue bear a "substantial relation" to the objective sought to be obtained.

and the lower courts, this Court should grant Land and Lakes' petition for writ of certiorari.

IV. THE CITY HAS ATTEMPTED TO DENY LAND AND LAKES ITS PROPER ZONING UNDER THE GUISE OF AN UNCONSTITUTIONAL "ENVIRONMENTAL" ORDINANCE

Finally, the City argues that even if there is a heightened level of scrutiny for land use cases, this case involves an environmental regulation rather than zoning and therefore, the heightened level of scrutiny does not apply to the City's landfill moratorium ordinance.[7] The City's argument is based on circular reasoning and should be rejected. The City has improperly attempted to use the landfill moratorium ordinance to deprive Land and Lakes of the right to use the landfill pursuant to its duly authorized zoning.

The City argues in its Brief in Opposition that the landfill moratorium ordinance is a "straight-forward environmental control measure." (City's Brief in Opp. at p. 13). The City admits, however, that Land and Lakes has a valid Illinois Environmental Protection Agency ("IEPA") operating permit. (City's Brief in Opp. at p. 3). Under Illinois law the City can regulate environmental matters only to the extent that its regulations remain consistent with State standards. *See County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979) (holding that home rule units could regulate landfills through zoning ordinances, but such ordinances must conform to uniform standards established by the State).[8] Here,

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[7] As set forth in Land and Lakes' Petition, the City's landfill moratorium ordinance is not "temporary" as the City would have this Court believe; rather, the ordinance has been continuously renewed (with the exception of one 8-day period) from 1984 until the year 2000. (City's Brief in Opp. at p. 3). By enacting such an ordinance for 16 years, the City has made a *policy decision* for the *prohibition* against new or expanding landfills in the City of Chicago.

[8] The City argues that Land and Lakes' IEPA operating permit on its face requires compliance with all local regulations. Under *Sexton*, however, the City can require no more than that of the State. The City's moratorium ordinance cannot, therefore, nullify the very IEPA permit which authorizes Land and Lakes to operate its landfill facility.

the State of Illinois already has determined that use of the entire 122nd Street Facility as a landfill is environmentally safe to the public health, safety and welfare.[9] Under *Sexton*, the City can only replicate these same environmental standards. Thus, because the moratorium ordinance fails to replicate these environmental standards, and in fact attempts to nullify them, the moratorium ordinance is not a proper "environmental control measure," as the City contends.

The City's landfill moratorium ordinance is, in fact, an attempt by the City to rescind the zoning of Land and Lakes' 122nd Street Facility without the City having to go through the proper zoning process.[10] Indeed, even the Illinois Appellate Court recognized that the City's landfill moratorium ordinance was analogous to a zoning ordinance, and analyzed it as such. (App. at A17.) Had the City gone through the proper channels to attempt to change the zoning of the landfill, it would nevertheless have had to allow Land and Lakes to operate its entire 122nd Street Facility under the "prior non-conforming use" doctrine.[11] Yet, the City's landfill moratorium would prohibit Land and Lakes from operating the entire landfill,

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[9] Moreover, the City does not claim that the Land and Lakes' facility is a threat to the public health, safety or welfare. The trial court, in fact, found that the 122nd Street Facility was protective of the public health, safety and welfare. (App. at A38.)

[10] In 1982, two years *before* the enactment of the moratorium ordinance, Land and Lakes had been granted, by the City's own Zoning Board of Appeals ("ZBA"), a special use variance for the 27 acres of its landfill facility at issue in this case. In granting Land and Lakes a special use variance, the ZBA noted that Land and Lakes' proposed use of the 27 acres as a sanitary landfill would benefit the City in a variety of ways, including that it would serve the continuing public need for sanitary landfills, that it would complement land usage in the area, that the proposed use would eliminate the public health nuisances that had previously prevailed at the site before Petitioners purchased the facility, and that operation of a sanitary landfill would protect the public health, safety and welfare.

[11] *See, e.g.*, Municipal Code of Chicago, Ill. § 17-24-010 *et seq.* This doctrine is used to avoid situations such as the one before this Court where a prior use has been eliminated by a municipality's actions, in violation of substantive due process.

despite Land and Lakes having a valid special use variance and IEPA operating permit to do so, which determined respectively that the siting was appropriate and that Land and Lakes met all the environmental criteria for operation of its landfill.[12]

In the alternative, the City's attempt to deny Land and Lakes the fruits of its zoning, without granting Land and Lakes the right to continue to operate consistent with its prior use, is a clear violation of Land and Lakes' substantive due process rights even under a "rational relation" test. For all of these reasons, this Court should grant Land and Lakes' Petition.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[12] Land and Lakes had the necessary permits and zoning to operate its entire 122nd Street Facility as a sanitary landfill prior to the enactment, and subsequent renewals, of the landfill moratorium ordinance. The trial court also determined that Land and Lakes had a right to a City operating permit during an 8-day period of time when the landfill moratorium ordinance lapsed in 1994. (App. at A45.)